ENFORCING CLASS ACTION WAIVERS IN LABOR CASES POST-*CONCEPCION*

Prepared by:

Demetrius X. Lambrinos
Zelle Hofmann Voelbel & Mason LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
(415) 693-0700
dlambrinos@zelle.com

February 9, 2013

I. INTRODUCTION

Class arbitration waivers (also called "class action waivers") are provisions found in many types of contracts, including employment agreements, which require the parties to submit to individual arbitration and to forego any form of class-wide relief. The Supreme Court addressed the enforceability of such waivers in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1753 (2011) ("*Concepcion*"), where it held that California's *Discover Bank* rule, which essentially banned class action waivers in most consumer contracts, was "preempted" by the Federal Arbitration Act ("FAA"). Later this year in *In re American Express Merchants' Litigation*, 667 F.3d 204 (2d Cir. 2012) ("*Amex III*"), *cert. granted*, 133 S. Ct. 594 (Nov. 9, 2012), the Court will address the related issue of whether a class action waiver can be found invalid under *federal* common law doctrines, such as the "Federal Substantive Law of Arbitrability," in instances where enforcing the waiver would effectively prevent the claimants from vindicating their federal statutory rights under the Sherman Act. 667 F.3d at 213, 216.

While the Court's decision in *Amex III* will undoubtedly shed considerable light on the ability of corporate defendants to enforce class action waivers in antitrust cases, it may leave lingering questions regarding their enforcement in labor cases. However, as the case summaries below indicate, every circuit court to weigh in on this issue post-*Concepcion* has held that class action waivers are generally enforceable in the employment context. While two circuit courts did find mandatory arbitration provisions unenforceable in the context of labor disputes, those courts did not employ the vindication of federal statutory rights analysis. Instead, they relied on state common law contract principles, and found that the provisions at issue were "illusory" because they were subject to unilateral modification by one of the parties. These trends provide relatively clear guidance to parties seeking to challenge class action waivers in labor cases.

II. THE CIRCUIT COURT LANDSCAPE

A. First Circuit

Soto-Fonalledas v. Ritz-Carlton San Juan Hotel Spa & Casino, 640 F.3d 471, 473 (1st Cir. 2011), involved a class action brought by a female employee against Ritz-Carlton under Title VII and the American with Disabilities Act ("ADA") for alleged employment discrimination. *Id*. The defendant moved to compel arbitration pursuant to a provision contained in an employment agreement that the plaintiff had signed. *Id*. There was no class action waiver at issue per se, but after the district court granted the motion, the plaintiff argued on appeal that the arbitration provision at issue "deprive[d] her of remedies granted by Title VII and the ADA." *Id*. at 474. In affirming the district court, the First Circuit acknowledged that "some federal statutory claims may not be appropriate for arbitration," but cautioned that "the burden is on the party resisting arbitration to show… that Congress, in enacting a particular statute, intended to preclude a waiver of a judicial forum for certain statutory claims." *Id*. at 476, *citing Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20, 26 (1991) ("*Gilmer*"). The court concluded that the challenged arbitration provisions were ambiguous as to the available remedies, and that the plaintiff failed to demonstrate, as was her burden, that their enforcement would "interfere with the effective vindication of [her] statutory rights." 640 F.3d at 477 n.3.

Awuah v. Coverall North America, Inc., No. 12-1301, --- F.3d ----, 2012 WL 6699813, at *1 (1st Cir. Dec. 27, 2012), involved a class action brought by six "franchisees" against a janitorial services company under Massachusetts' wage and hour laws for allegedly misclassifying them as independent contractors and failing to pay them appropriate wages. The defendant moved to compel arbitration pursuant to a "Consent and Transfer Agreement" that included a class action waiver, which at least some of the claimants had signed. *Id*. The district

court denied the motion and held that the waiver was unenforceable. *Id*. The court found that the claimants had never seen the actual arbitration provisions, and in the employment context, "arbitration clauses cannot be enforced unless there is heightened notice to the party sought to be bound." *Id*. at *6. The First Circuit reversed with instructions to stay plaintiffs' claims pending arbitration. The circuit court held that there was no "heightened notice" requirement for class action waivers in labor cases under Massachusetts state law, and that even if there were, "such a principle would be preempted by the FAA" under *Concepcion*. *See id*. at *7.

B. Third Circuit

Quilloin v. Tenet HealthSystem Philadelphia, Inc. 673 F.3d 221, 227-28 (3d Cir. 2012), involved a class action brought by a registered nurse against her employer under the Fair Labor Standards Act ("FLSA") for allegedly requiring her to work during meal periods. The defendant moved to compel individual arbitration pursuant to a class action waiver contained in an "Employee Acknowledgment" form that the plaintiff signed. *Id*. at 225. The district court denied the motion, and held that under Pennsylvania's law on unconscionability such waivers are unenforceable where "the high cost of arbitration compared with the minimal potential value of individual damages denie[s] every plaintiff a meaningful remedy." *Id*. at 232, *citing Thibodeau v. Comcast Corp.*, 912 A.2 874, 883-84 (Pa. Super. Ct. 2006). The Third Circuit reversed with instructions to compel arbitration, and held that "even if the agreement explicitly waived Quilloin's right to pursue class actions, the Pennsylvania law prohibiting class action waivers is surely preempted by the FAA under *Concepcion*." 673 F.3d at 232.

C. Fifth Circuit

Carey v. 24 Hour Fitness, USA, Inc., 669 F.3d 202, 204 (5th Cir. 2012), involved a class action brought by a former sales representative against his employer under the FLSA for

allegedly failing to fully compensate him for overtime work. The defendant moved to compel individual arbitration pursuant to a class action waiver contained in an "Employee Handbook Receipt Acknowledgment" that the plaintiff had signed. *Id*. The district court denied the motion and the defendant appealed. *Id*. The Fifth Circuit affirmed the district court and held that the arbitration provision was unenforceable. *Id*. The court found that under Texas contract law, "an arbitration clause is illusory [and therefore unenforceable] if one party can avoid its promise to arbitrate by amending the provision or terminating it altogether." *Id*. at 205 (internal quotes omitted).

D. Eighth Circuit

Green v. SuperShuttle Int'l, Inc., 653 F.3d 766, 767 (8th Cir. 2011), involved a class action brought by shuttle bus drivers against a shuttle bus company under the Minnesota Fair Labor Standards Act alleging that they had been misclassified as "franchisees rather than employees." Defendant moved to compel individual arbitration under "Unit Franchise Agreements" that contained class action waivers, which the claimants had signed. *Id*. The district court granted the motion and dismissed plaintiffs' claims without prejudice. *Id*. at 768. On appeal, the plaintiffs argued that class action waivers were "unenforceable under Minnesota law." *Id*. at 769. The Eighth Circuit affirmed the district court orders compelling arbitration and enforcing the class action waivers, but reversed the order dismissing the case without prejudice rather than staying the proceedings pending arbitration. *Id*. at 770. In the court's view, the "Minnesota-state-law-based challenge" to the class action waivers at issue "suffer[ed] from the same flaw as the state-law-based challenge in *Concepcion*—it is preempted by the FAA." *Id*. at 769.

Owen v. Bristol Care, Inc., No. 12-1719, --- F.3d ----, 2013 WL 57874, at *1, *4 (8th Cir. Jan. 7, 2013), involved a class action brought by a health care "administrator" against her employer under the FLSA for allegedly misclassifying her as an "exempt" employee and illegally denying her overtime pay. The defendant moved to compel individual arbitration pursuant to a class action waiver contained in a "Mandatory Arbitration Agreement" that the plaintiff had signed. *Id*. at *1. The district court denied the motion, and held that "[i]n the employment context, waivers of class arbitration are not permissible." *See Owen v. Bristol Care, Inc.*, No. 11-04258-CV-FJG, 2012 WL 1192005, at *4 (W.D. Mo. Feb. 28, 2012), *citing D.R. Horton, Inc. and Michael Cuda,* 357 N.L.R.B. 184 (2012) ("*D.R. Horton*"). The district court found that *Concepcion* was "not controlling" in the labor context, and that compelling arbitration here would "violate[] the plain language of the FLSA," which expressly permits claimants to seek class-wide relief. 2012 WL 1192005, at *4-5, *citing* 29 U.S.C. § 216(b). The court concluded that "when a Plaintiff's statutory rights are not capable of vindication through arbitration, the federal substantive law of arbitrability, grounded in the FAA, allows federal courts to declare otherwise operative arbitration clauses unenforceable." 2012 WL 1192005, at *4.

The Eighth Circuit reversed and held that "arbitration agreements containing class waivers are enforceable in FLSA cases." 2013 WL 57874, at *4. The court concluded that the controlling authority in such cases is *Gilmer,* not *D.R. Horton* or *Concepcion*. *Id*. *Gilmer* involved a suit by a registered securities representative against his employer for violations of the Age Discrimination in Employment Act ("ADEA"). *See* 500 U.S. at 20. The *Gilmer* Court held that such statutory claims were arbitrable "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue" or there is an "inherent

conflict" between the statute's underlying purpose and the FAA. *Id.* at 26. The *Gilmer* Court also noted that "[t]hroughout such an inquiry, it should be kept in mind that questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration." *Id*. (internal quotes omitted). The Eighth Circuit concluded that *Gilmer* did not afford special protection for employment cases and that its holding "forecloses the argument that Supreme Court precedent upholding the enforceability of class waivers is limited to the consumer context." 2013 WL 57874, at *4. The court also concluded that *Gilmer* and several cases from other circuits enforcing class action waivers in labor cases were "consistent with more than two decades of pro-arbitration Supreme Court precedent." *Id*.

E. Eleventh Circuit

Douglass v. Johnson Real Estate Investors, LLC, 470 Fed. Appx. 823 (11th Cir. 2012) ("*Douglass*"), was an individual action brought by a former employee against his employer for alleged violations of the ADEA. *Id*. The defendant moved to compel arbitration pursuant to an arbitration provision contained in a "Mandatory Dispute Resolution Agreement" that the plaintiff had signed. *Id*. at 824. The district court denied the motion and the defendant appealed. *Id*. The Eleventh Circuit affirmed, and held that the arbitration provision was unenforceable under Massachusetts contract law because the defendant's promise to arbitrate was "illusory." *Id*. at 826. The court concluded that where one of the parties "retain[s] the right to unilaterally modify part of the integrated contract," the promise to arbitrate is not really a promise, because the requirement to arbitrate can be removed from the contract at any time. *Id*. While *Douglass* did not involve a class action waiver, its holding is nonetheless instructive as to the effectiveness of challenges to mandatory arbitration provisions based on state common law contract principles.

III. CONCLUSION

The cases above illustrate a clear trend among the circuit courts holding that challenges to class action waivers in labor cases based on state law unconscionability doctrines are preempted under *Concepcion.* There is willingness on behalf of some circuits, however, to entertain challenges based on state common law contract principles. These trends suggest that for the time being, and unless a circuit split emerges, whether challenges to class action waivers in labor cases succeed or fail will depend largely on which of these strategies is employed.